IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE

WRIT PETITION NO. 4973 OF 2007

Dashrath Rajpati Pandey.... Petitioner

versus

Dinesh Bhimshi Furia & anr..... Respondent.

Mr. V.P.Savant i/b S.K.Dubey for the petitioner.
Mr. S.V. Trivedi for the respondent.

CORAM; A.P. DESHPANDE, J.
DATED; 01ST OCTOBER, 2007

P.C.;

1. The petitioner herein is the original plaintiff who instituted a Short Cause Suit No. 4997/04 claiming relief of declaration that the defendants nos. 1 to 3 have no right, title and interest in the suit premises viz. Shop No.6, and further claiming injunction not to interfere with the possession of the plaintiff. In the said suit, Notice of Motion was taken out by the petitioner seeking relief of temporary injunction. At that stage, the plaintiff and the defendant no.1 entered into a compromise and placed on record Consent Terms. The Plaintiff deleted the defendant nos.2 and 5 from the array of defendants and thus the parties to the suit were, the plaintiff

and the defendant no.1, who compromised the claim as stated hereinabove. A prayer was made for disposal of the Notice of Motion in Consent Terms and it was so done by the trial court and trial court recorded the consent terms by its order dated 20-10-2004.

2. Under the consent terms the defendant no.1 agreed to sell to the plaintiff shop no.6 for Rs.10,72,000/- and the payment was to be made in 16 equal monthly instalments, each instalment being of Rs. 67,000/-. It was further agreed that the said payments of 16 instalments, each one of Rs. 67,000/- shall be made by handing over 16 post dated cheques drawn on Union Bank of India. Each monthly payment was to be made every month commencing from 10th November 2004 onwards. The material clauses for the purposes of this writ petition are clauses Nos. 8, 9 and 10 which reads thus:

> 8. It is agreed that in default of payment of any 2 (two) instalments i.e. if the said Cheques given are dishonoured or any ground whatsoever, the plaintiff shall forthwith return the premises being shop no.6 to defendant no.1 without any right thereto and the instalments paid, if any, shall stand adjusted towards use of the said premises.

9. It is made clear that the said shop no.6 aforementioned shall continue to belong to defendant no.1 till all the instalments are paid in full. It is further agreed that upon full payment being made, the defendant no.1 shall execute, ownership - agreement transferring shop no.6 from the name of the defendant no.1 to the name of the plaintiff. It is further made clear that all the stamp duty and registration charges shall be borne and paid by the plaintiff only.

10. In order to protect the premises being shop no.6, during the interregnum period, the Court Receiver, High Court, Bombay is formally appointed. The Plaintiff shall occupy the said shop as an Agent of the Court Receiver without any Royalty and/or Security. The Court Receiver is given all powers to take back the possession as per Clause No.8 above. All charges of the Court Receiver shall be borne and paid by the Plaintiff only.

3. It is undisputed that first seven cheques were encashed in time on their presentation to the bank.

However, remaining nine cheques were not encashed and came to be dishonoured. Realising the difficulties likely to crope up on account of dishonour of cheques, the petitioner/plaintiff moved a Notice of Motion with a view to seek extension of time, seeking the relief of injunction restraining the defendant no.1 from realising nine cheques, and also prayed for variation or modification of the Consent Terms by seeking to reduce the quantum of instalments from Rs. 67,000/- per month to Rs. 27,000/- per month and a further extension of time was also prayed for. Record reveals that the said Notice of Motion was never numbered nor pressed into service at any point of time. At a later point of time the Plaintiff took out a second Notice of Motion bearing No.503/06. In the said Notice of Motion, the plaintiff prayed for setting aside the Consent Terms dated 19-10-2004 and further sought an injunction against the defendant from acting upon the Consent Terms. The rejection of this Notice of Motion has given rise to the filing of the present petition.

4. It was urged before City Civil Court that the Consent Terms are contrary to Order 23 Rule 3 as the Consent Terms are unlawful and void. Whereas the defendant has contended that the Notice of Motion has been taken out with a view to deprive the defendant of his legal right to the suit premises. It was

contended by the defendant that the Plaintiff has failed to comply with his part of the obligation and is not entitled to continue to possess the suit premises. A bare perusal of clauses 8, 9 and 10 of the Consent Terms reveal that it was specifically agreed that if the Plaintiff fails to make the payment as stipulated, the defendant shall be entitled to take possession of the suit shop. When the Court accepted the Consent Terms, it had appointed the Court Receiver and symbolic possession of the shop was taken by the Receiver, and the Plaintiff's possession was to be as an agent of the Court Receiver. The City Civil Court has categorically held that the Consent Terms are not contrary to Order 23 and the Consent Terms need to be implemented. It has proceeded to hold that as the Plaintiff has failed to perform his part of the obligation, the defendant is entitled to take the possession of the suit shop as per the Consent Terms. It will not be out of place to state at this juncture that, when the Notice of Motion was being considered, a report from the Court Receiver was received which is dated 18-12-2006 and therein it is prayed that Receiver be directed to take possession of the suit premises. While disposing of Notice of Motion, the Court Receiver's report dated 18-12-2006 has made absolute in terms of prayer clause (a) and (b).

5. The learned counsel for the petitioner/plaintiff has contended that the City Civil Court has erred in law in passing the impugned order without adjudicating the Notice of Motion filed prior in point of time, wherein a prayer was made for extension of time to pay the amount. It is submitted that had the Court considered the said Notice of Motion, before passing of the order on Notice of Motion No.503/06, it would have enabled the plaintiff to seek extension of time for making payment by pointing out that the default in payment of nine instalments was for reasons beyond the control of the Petitioner. In the submission of the learned counsel, the default contemplated under the Consent Terms are willful defaults and not the defaults on account of reasons beyond the control of the petitioners.

6. Per contra, the learned counsel for the respondent has submitted that the petitioner himself chose not to press the earlier Notice of Motion and the same is evident from the fact that the Notice of Motion has not even been numbered till date. It is then submitted that in supersession of the earlier Notice of Motion, the present Notice of Motion has been taken out and what was prayed for, was not seeking time for making payment but for setting aside the Consent Terms. It is also brought to my notice that the

earlier Notice of Motion was dismissed in default as the suit itself was dismissed in default. Whereas according to the counsel for the petitioner, the suit came to be restored and thus all applications filed in the suit also stood restored. I do not propose to deal with that issue for the obvious reason that the trial court has not passed any order in the earlier Notice of Motion. I am confining my order to the extent of the correctness or otherwise of the impugned order dated 20-3-2007 disposing of Notice of Motion No. 503/06. I have perused the order. The impugned order goes to honour the compromise entered into between the parties reflected in the Consent Terms and to be more precised, clauses 8, 9 and 10 thereof, and no fault can be found with the impugned order. There being no merit in the Writ Petition, the same is summarily dismissed. However, it is made clear that the petitioner shall be at liberty to move the City Civil Court with a view to seek decision on the Notice of Motion, which according to the petitioner is pending on the file of the City Civil Court seeking extension of time for payment of the amount and the City Civil Court shall deal with the same in accordance with law.

7. The interim order of statusquo operating in this petition shall continue to operate till 10th October

2007.

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